United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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AMERICAN METAL CLIMAX, INC.,

Plaintiff-Appellee,

against

ESSEX INTERNATIONAL, INC.,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

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The Brief of plaintiff-appellee American Metal Climax, Inc. ("Amax"), while conceding that the "primary contention on appeal" of defendant-appellant Essex International, Inc. ("Essex") is that the lower court's award of lost profits in the amount of $4.1 million is not supported by credible evidence, and that Essex's "subsidiary contention, argued late in its brief, is that it did not breach the contracts at all" (Amax Brief, pp. 1-2), nonetheless does not reach Essex's "primary contention" on damages until rather late in its own 52-page brief, and does not reach the first point advanced by Essex until page 49. Rather, Amax's Brief concentrates on painting Essex with as black a hat as possible:

> "And so for Essex the course of economic logic was obvious: break the deal with Amax. In May 1968, the

> Court found, Essex fabricated a pretext and reneged. Without warning, without discussion and without justification, Essex renounced its obligations to Amax." (Amax Brief, p. 3)

Without dwelling upon the fact that those are hotly contested assertions, and unsupported by Judge Motley's opinion, Essex can nonetheless understand why Amax seeks to divert this Court's attention from its proof of damages, or lack thereof.

For purposes of Point I in Essex's principal brief, Essex's reason for "repudiating" its agreements with Amax, fabrication of pretexts, or reneging on contractual obligations, may be assumed, *arguendo,* to be as sinister, reprehensible, and dishonest as Amax would like. Amax is nonetheless obliged to prove its "lost profits" by proper evidence under New York law and this it has not done. Quite to the contrary, there are crucial *voids* in Amax's evidence which will not go away, and even the scant evidence offered boils down basically to guesswork and wishful thinking.

I. Voids in Amax's Evidence

The first point on damages made by Essex is that at best Amax has only proved Intalco's cost of making aluminum rod and not its own cost. (Essex Brief, pp. 17-20) Essex points out that Amax has made no pretense of accounting for the time, travel, and other expenses for its own employees, and the support personnel and overhead costs backing them up. (Essex Brief, pp. 18-19)

Amax finally reaches this point on page 49 and advances two "answers". First, Amax argues that Essex "speculates, Intalco's costs may not have been Amax's costs," and asserts

> "In the first place, there is no evidence at all in the record of this case to indicate anything else but that Intalco's costs *are* Amax's costs." (Amax Brief, pp. 49-50)

But the evidence in this case shows very clearly that Amax had substantial costs of its own which neither it nor Intalco made any effort to account for in the blackboard calculation of damages. (156E) For example, Amax's bills to Essex, and presumably those to Okonite had any shipments ever been made, were handled by Amax and not Intalco. (146E-154E) The record is clear that other accounting and bookkeeping functions were also being performed by Amax and not Intalco. (19E-21E, 203E, 254E-255E, 516a) Operational problems, although involving Intalco personnel, likewise concerned the Amax executives, and they traveled to Intalco, met repeatedly with Essex, and actively worked on those problems. (511a-516a, 340a-341a, 346a-348a) Amax executives, and particularly Messrs. Furbacher and Kaufmann, not only met with Essex but also received weekly reports from Intalco's operating personnel. (81E *et seq.*) Legal problems were likewise handled by Amax's inside counsel, not by Intalco's counsel, if any. (254E) Technical advice on the Properzi came from Amax (215E-220E) and not from anyone at Intalco because the Intalco operating personnel knew nothing about Properzi equipment. (311a-314a) Finally, sales to third parties by Amax were negotiated by Amax and not by Intalco. (225E-228E)

Under these circumstances, Essex has done somewhat more than "speculate" that Intalco's costs are not Amax's costs, and in fact the record is very clear that Amax had the additional costs for executives' time, overhead and support facilities that one would normally anticipate.

Amax's second "answer" to this first void noted by Essex is:

> ". . . any administrative costs that Amax *might have incurred* in servicing its supply contracts with Essex and Okonite are clearly washed out by the administrative costs Amax *did actually incur* in reselling that much aluminum to other customers in the form of T-ingot." (Amax Brief, p. 51)

Amax cites no reference to the record in support of this claim of a "wash", which is not surprising since there is

nothing. Not only is the record void as to the magnitude, as contrasted to the existence, of Amax's "administrative costs", but it is also absolutely void as to any administrative costs incurred by Amax in reselling that much aluminum as T-ingot. In short, the claim of a "wash" is speculation pure and simple, unsupported by any evidence, was never made to Judge Motley below, and is obviously unsupported by any of her findings of fact.

The law is clear that a plaintiff must account for his own cost of performance which includes his relevant overhead. See, *e.g.*, *Alexander's Department Stores* v. *Ohrbach's, Inc.*, 269 App. Div. 321, 331-32, 59 N.Y.S.2d 173, 181-82 (1st Dept. 1945); *342 Holding Corp.* v. *Carlyle Construction Corp.*, 31 A.D.2d 605, 606, 295 N.Y.S.2d 248, 250 (1st Dept. 1968). If the seller does not account for these costs, he is not put in as good a position as if the buyer had performed as is required both under the Uniform Commercial Code, UCC §1-106(1), and under New York common law, *Freund* v. *Washington Square Press, Inc.*, 34 N.Y.2d 379, 382, 314 N.E.2d 419, 420-21, 357 N.Y.S.2d 857, 859-60 (1974), but in a better position.

The second point made by Essex concerning voids in Amax's damage evidence is that Intalco billed Amax a premium over Intalco's own cost for the different forms in which aluminum came out of the cast house, but no witness ever revealed the magnitude of that premium although Amax's cost would be no less than Intalco's estimated cost of 17.053 cents per pound plus this premium. (Essex Brief, pp. 19-20)

Amax advances three "answers" to this second void. First, Amax argues that it was a part owner of Intalco, and therefore:

> "If Intalco adds some profit mark-on to its billings (a matter about which the record is completely silent), then the owners must recoup those amounts by virtue of their equal participation in Intalco's profits." (Amax Brief, p. 50)

Again Amax gives no record citation in support of this alleged "recoupment" because there is nothing there to

cite to, the "recoupment" theory was never advanced to Judge Motley, and there certainly is no finding in that regard.*

As to Amax's second answer that "the record is completely silent" as to whether Intalco adds some profit markon on its bills to Amax (Amax Brief, p. 50), Amax apparently does not focus upon the testimony of its own witnesses. The Intalco witness, Thorley Briggs, testified that:

> "Upon my arrival in September 1967, Mr. Loyer asked me to review the costing and pricing systems that we had at Intalco. This was very important because our loan and our metal purchase agreements predicated an accurate costing system, so that the owners could be billed for the metal properly and in conformity with the metal purchase agreements." (228a)

After some discussion of that costing system, Briggs continued:

> "Q. Okay. Our next line [Exhibit D-30 (180E)] is premium over T-ingot. What does that mean, sir?
>
> "A. Okay. Our standard method of billing at Intalco is that we calculate a cost, using this same technique for our simplest product which is T-ingot. This is an alloyed—unalloyed—pardon me—a hundred percent aluminum ingot. This, by definition, is the simplest product that we can make.
>
> "Q. T-ingot is?
>
> "A. T-ingot, right. And what we do is that when we bill our owners, we bill them for every pound going out gets a T-ingot billing. In addition to a T-ingot billing, they're billed a premium for the different alloys or the different forms that the cast house can give aluminum." (238a)

Essex respectfully suggests that Amax's rod cost is no less than Intalco's T-ingot cost plus the appropriate premium

* There is also no evidence of "equal participation" by the owners in Intalco's profits.

for rod which Briggs clearly testified was billed to Amax and the other owners.*

Amax's third answer to the "premium" void, would you believe, is that there was another convenient wash:

> "Furthermore, if Intalco had added a profit mark-on to every pound of Properzi rod it produced for Amax, it would also have added a profit mark-on to every pound of T-ingot it produced for Amax after cancellation of the Properzi contracts. Therefore, in calculating the difference between Amax's anticipated profits on rod sales and Amax's actual profits on T-ingot sales, the profit mark-ons would wash out, and the lost profits calculation would be precisely the same as that presented at trial." (Amax Brief, p. 51)

Without belaboring the matter further, Amax once more cites nothing in the record in support of this second "wash," there is nothing, the "wash" was never mentioned to Judge Motley, and obviously no finding of fact was made by her in this regard.**

Essex respectfully submits that Amax's cost of producing rod must include the administrative and overhead ex-

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* In a footnote (Amax Brief, p. 50), Amax apparently concedes that in fact Intalco bills its owner a "premium" if the aluminum produced for the owner is in the form of rod or any other product more complicated than T-ingot. However, Amax argues that Essex has misinterpreted the above-quoted testimony by Briggs, and asserts that this "premium" was somehow taken into account in Clough's blackboard calculation (156E) when Clough purported to give Essex credit for the T-ingot profits enjoyed by Amax. This footnote is discussed at pp. 16-17 *infra*, in connection with Essex's treatment of T-ingot profits.

** Even if a "wash" had been asserted and proved below, which it wasn't, the two premiums could in fact wash only if the premium for rod was identical to the premium for T-ingot. Again the record is silent although Briggs clearly implied the two premiums were different when he testified the owners were "billed a premium for the different alloys or the different forms that the cast house can give aluminum" (238a). Similarly, Amax's witness, Thomas Kaufmann, testified that Amax in turn charged its own divisions different amounts for metal, including new premiums or profits "depending on the quality and work that went into the metal" (513a). Thus, simple products such as T-ingot appear to carry a lower premium than more advanced products such as rod.

penses incurred by it and the "premium" billed to Amax by Intalco. Amax had the burden of proving the magnitude of *its* costs. Because of these two voids, Amax's "lost profits" cannot be calculated, and thus Judge Motley's findings as to such "lost profits" are clearly erroneous.

II. Amax Must Prove Post-Breach Costs Where Available

The second point on damages made by Essex is that damages must be determined as of the time when and place where performance was to be rendered. Amax has calculated lost profits as of the date of breach, based upon estimates made at or about that time, even though actual costs for the significant cost elements over the post-breach delivery periods are readily available to Amax from its own records (Essex Brief, pp. 21-23).

In response to this second point, Amax apparently concedes, as it must, that it made no effort at trial to prove post-breach costs (Amax Brief, p. 36), but appears to claim surprise as to Essex's position in this regard:

> "Now, on this appeal, Essex comes up with a contention which it did no more than hint at while the trial was going on. It contends that Amax should have presented evidence not as of the date of breach but for the entire damage period 1968-73." (Amax Brief, p. 37)
>
> * * *
>
> "In any event, the short answer to this Essex contention is that it comes a little late." (Amax Brief, p. 38)

This claim of "surprise" is unfounded. The principal Intalco witness, Thorley Briggs, was cross-examined at length concerning variation in the magnitude of cost elements over the period subsequent to the breach (270a-275a). Amax's failure to prove post-breach variations in costs was detailed to Judge Motley (112a), and specifically asserted to Judge Motley as a failure of proof by Amax (126a).

As to Amax's assertion that "Essex does *not* say that we should have proven the variations in our contract prices

with Essex and Okonite . . .'' (Amax Brief, p. 37), Amax is correct because the post-breach market price data, upon which the actual post-breach contract prices with Essex and Okonite can be developed, were proved, not by Amax, but by Essex in connection with Essex's proof of Amax's true profits on T-ingot (265E).

Finally, as to Amax's complaint that Essex did not object to Amax's proof of May 1968 costs and profit margins on the grounds of relevance (Amax Brief, p. 38), the short answer is that those costs and profit margins are relevant, but as a starting point rather than as the final word on the subject.

At last Amax gets to the nub of the matter: Amax simply disagrees as a matter of law. Specifically, Amax contends that under New York common law and also under Section 2-708(2) of the Uniform Commercial Code it is not obligated to prove post-breach variations in cost (Amax Brief, pp. 38-44).

In its discussion of the law, Amax advances the theory that a seller's damages for breach of an executory contract are to be computed as they appeared as of the date of repudiation. (Amax Brief, pp. 38-40) After dusting off a volume of New York reports for the year 1845 and then tossing in a handful of decisions from other jurisdictions in an attempt to shore up this theory legally, Amax ignores the viable precedents of this Circuit, *In re New York, N.H. & Hartford R.R. Co.*, 298 F.2d 761, 764 (2d Cir. 1962), the literal language of the drafters of the Uniform Commercial Code, Official Comment, U.C.C. §2-708, at p. 605 (McKinney 1964), and the wisdom and logic of one of the most esteemed commentators on commercial law, 5 *Corbin on Contracts* §1053, at 310-12 (1964). Whatever the law of New York may have been 16 years prior to the Confederate Army's attack on Fort Sumter, these authorities confirm that the law of New York today calls for valuation of a promised performance as of the time when and the place where performance was to be rendered. See also *Callan* v. *Andrews*, 48 F.2d 118, 119-20 (2d Cir. 1931); *Reliance Cooperage Corp.* v. *Treat*, 195 F.2d 977, 982-83 (8th Cir. 1952); 11 *Williston on Contracts*

§1397 at 517-22 (3rd ed. 1968); *Restatement of Contracts* §338 (and pocket part of New York Annotations, p. 210) (1932).

Retreating somewhat, Amax then suggests that even though the law may indeed require fixing a seller's damages for anticipatory repudiation at the time of performance, nevertheless, the instant case fails within a recognized exception to such a rule. Citing *McJunkin Corp.* v. *North Carolina Natural Gas Corp.*, 300 F.2d 794 (4th Cir. 1961), *cert. denied*, 371 U.S. 830 (1962), and 67 *Am. Jur. 2d, Sales* §644 (1973), Amax claims that when time of delivery of goods under an executory contract has not been fixed, there is no definite date of performance, and, therefore, the time for delivery will be equated with the time when the buyer definitely renounces or repudiates the contract. (Amax Brief, p. 42)

However, *McJunkin* is a case preceding the Uniform Commercial Code. Moreover, the exception which Amax claims *McJunkin* stands for has no application here because the time of delivery and date of performance under both the Supply Contract and the Okonite Contract were fixed. The Okonite Contract estimated Okonite's requirements at specific amounts ranging from 9 to 35 million pounds for each of the years 1968 through 1972, and provided:

> "Buyer shall space and allocate its requirements and requests for shipment so as to divide the annual total in any year into twelve (12) equal (plus or minus 10%) monthly shipments." (225E)

Similarly, the Supply Contract provided for deliveries of at least 18,000,000 pounds and no more than 25,000,000 pounds for each of the years 1968 through 1973 (163E), and specified:

> "With respect to 1968 through 1973, Amax shall not be obligated to deliver in any month more than 1/10th of the maximum quantity above specified for any calendar year." (166E)

Thus, unlike the situation in *McJunkin*, both contracts specified the amount of rod to be delivered on a monthly basis throughout their respective terms.

In addition, the holding of the *McJunkin* case does not support the proposition advanced by Amax. In that case, plaintiff-supplier stood ready to sell and deliver pipe identifiable to the contract with defendant, with prices based upon government price regulations and the manufacturer's price as of the date of shipment. At issue was the proper commission rate to be applied in determining the damages which plaintiff had suffered. The Court's holding is beyond cavil:

> "There is not sufficient evidence to support a finding of a 3% commission under any rule of damages . . . since we decide this question of amount of discount on the basis of insufficiency of evidence *it is not necessary to decide what measure of damages rule is applicable* . . ." 300 F.2d at 804. (Emphasis added)

The Court also emphasized that in fixing damages it was bound to put the plaintiff in as good a position as full performance would have placed him.

True, the *McJunkin* court did say by way of *dictum* that the authorities suggested that when the time of delivery was indefinite and a contract breached anticipatorily, that the time of performance was to be fixed as of the date of breach, but manifestly this does not fit the facts of our case and also was not the ground upon which the decision was rendered. Furthermore, the only authority which the *McJunkin* court cites in support of this *dictum* is 46 *Am. Jur., Sales* §618. While Amax likewise relies on this authority although updates the reference to *Am. Jur. 2d,* Amax fails to note that 67 *Am. Jur. 2d, Sales* §644 refers to the *McJunkin* case in connection with the Uniform Sales Act which, according to that authority, fixed damages for non-acceptance of goods, where no time was fixed for acceptance, at the time of breach. But *Am. Jur. 2d* goes on to emphasize on the next page that the Uniform Commercial Code has changed that rule. 67 *Am. Jur. 2d, Sales,* §644, at p. 839.

It is submitted that in keeping with the pragmatic spirit of the Uniform Commercial Code, which calls for putting "the seller in as good a position as performance would

have done . . .'' (U.C.C. §2-708(2)), the value to Amax of full performance of these contracts can only be determined by reference to estimates realistically based upon the actual price of aluminum and Amax's actual costs incurred between the years 1968 and 1973.

Even if Amax is right and the curtain is drawn as of May, 1968, it is important to focus upon the proof actually offered by Amax. As to Intalco's hot metal cost, the most significant single cost element, Amax relies solely upon Briggs' oral testimony that the appropriate number from Intalco's standard costing system in the fall of 1967 was 15.2 cents (229a). There is no evidence at all as to what this cost was in May, 1968, let alone during the post-breach period when deliveries were to be made. Not one single piece of paper of any kind supports that fundamental cost although Amax has records which reflect that cost on a regular basis (498a).

As to conversion costs (the additional expenses incurred in changing this hot metal into rod), Amax did not prove *actual* costs for the fall of 1967, May, 1968, or any other time. Amax used *estimates* calculated by Briggs in May, 1968 and applied them over the whole damage period notwithstanding the ready availability of the *actual*, post-breach cost figures for most elements in the conversion cost. (Essex Brief, pp. 21-22)

III. Amax's Actual Cost Experience at Intalco

Essex's third point on damages, directly related to the above, is that Essex proved what Amax's actual cost experience was in producing aluminum rod on the Properzi at Intalco (Essex Brief, pp. 24-25). The actual cost of converting hot metal to rod at Intalco as of May, 1968 had been either 9.4 cents per pound or 9.2 cents per pound, depending upon which of Amax's rod production figures is utilized (Essex Brief, p. 24).

The Amax Brief does not and cannot dispute that actual conversion cost. Moreover, although Amax's damage calculation assumes a future conversion cost of 1.2 cents per pound, the Amax Brief ignores the actual cost of 9.4 cents

as of May, 1968, by characterizing it as a start-up cost. (Amax Brief, pp. 49, 52)

Essex submits that Amax cannot have the argument on post-breach costs both ways. If Amax really insists that a curtain must be drawn as of the date of breach, and all post-breach variations in costs ignored, then it must use actual costs as of that date which are 25.0 cents per pound for rod (15.769 cents for molten metal (180E) plus 9.2 cents or 9.4 cents for conversion).* Substitution of the actual rod cost of 25.0 cents for the Briggs' estimate of 17.0 cents in the blackboard calculation (156E), of course, wipes out all "lost profits."

On the other hand, if Amax wants to rely upon post-breach costs, then it must prove those post-breach costs to the extent they are available from its own records instead of using Briggs' estimate of what he believed in May 1968 those post-breach costs would turn out to be. Plaintiff's obligation is to prove its damages by the "best evidence available", with "such reasonable certainty as serves as a basis for the ordinary conduct of human affairs," using "the relevant facts antecedent and subsequent to the breach." *Mortimer* v. *Bristol,* 190 App.Div. 452, 462, 180 N.Y. Supp. 55, 62 (1st Dept. 1920); *Stevens* v. *Amsinck,* 149 App.Div. 220, 229, 230, 133 N.Y. Supp. 815, 822 (2d Dept. 1912). This Amax has made no effort to do.

IV. Lost Profits in a "New Venture" Situation

Essex's fourth point on damages offered in support of the first three points, establishes that performance under both the Supply Contract and the Okonite Contract was

* Even if the early April time frame (the period when the Properzi was operating at its best (38E)) is isolated, the conversion cost actually incurred was 5.8 cents. (152E) [$37,448.39 divided by 643,515 pounds] In Amax's blackboard calculation of damages, the break-even point (that is, the point at which the "lost profits" attributed to the Supply Contract and the Okonite Contract would be exactly offset by the conceded T-ingot profit of $13,328,100), is 18.811 cents. Thus, because Intalco's cost of molten metal was 15.769 cents (180E) the break-even conversion cost is 3.042 cents (18.811 cents minus 15.769 cents).

contingent upon the success of a new venture, and that a plaintiff's burden of proof in a new venture situation is particularly severe. (Essex Brief, pp. 17, 26-27)

Amax suggests that this is Essex's principal argument:

> "Essex's basic legal attack on the damages awarded below would treat this case as one of the rare situations where recovery is denied for lost profits anticipated from a 'new venture' because the very existence of such profits is too uncertain and speculative." (Amax Brief, p. 33)

Neither Essex's brief to this Court, nor its submission below to Judge Motley, argued that recovery for lost profits must be denied if such are based upon a new venture. Essex's position has always been only that a plaintiff's burden of proof is particularly heavy when he seeks future profits based upon a new venture situation.

Judge Weinfeld's opinion in *For Children, Inc.* v. *Graphics International, Inc.*, 352 F. Supp. 1280 (S.D.N.Y. 1972), discussed by Essex (Essex Brief, p. 27) and quoted from at length by Amax (Amax Brief, pp. 35-36), is directly in point. In that case, the plaintiff was a middleman, as is Amax here, purchasing books from a supplier (rod from Intalco here) and selling those books to third parties (Essex and Okonite here). In that case, as here, plaintiff was about ready to start selling, but was prevented from doing so by defendant's alleged breach.

In *For Children,* as here, plaintiff's selling price was fixed by contract and readily ascertainable. Thus, the only question, in calculating lost profits, was to determine plaintiff's costs.

Plaintiff in *For Children* proved that its cost under the contract with its supplier was $57,809.56. Plaintiff also proved that it had additional direct costs of $7,198.56. Plaintiff further proved that its "indirect costs such as salaries, travel and office expenses incurred in launching plaintiff's venture" amounted to $42,504.34. The only problem before Judge Weinfeld was how much of this overhead should be allocated to the new venture and how much should be allocated to the balance of plaintiff's ongoing

business, and he held that this uncertainty did not preclude an award of lost profits but rather he applied his own experience and made an allocation of 75%.

In the present case, Essex has demonstrated that, unlike plaintiff in *For Children*, Amax has not proved its cost from its supplier, Intalco, because it has ignored the premium over Intalco's T-ingot cost which Briggs specifically testified was billed to Amax (138a). Secondly, Essex has shown that Amax, unlike plaintiff in *For Children*, has not accounted for its own additional direct production costs and its "indirect costs such as salaries, travel and office expenses . . ." There is no starting point from which an allocation of this overhead, as was done by Judge Weinfeld, can be made.

Amax had the burden of proving the magnitude of these two cost elements, and these voids in Amax's proof preclude an award of lost profits in any case, but particularly in a new venture situation. Hence, the award of lost profits is not sustainable on the present record. *Friedman* v. *Golden Arrow Films, Inc.*, 442 F.2d 1099, 1107 (2d Cir. 1971).

Amax also suggests that Judge Motley disagreed that "Intalco was a 'new venture' akin to *Grand Rapids Showcase Co.*" (Amax Brief, p. 34). However, Amax's citation to the record does not support that statement and the Properzi project clearly was in fact a "new venture." (Essex Brief, pp. 26-27). Judge Motley merely held that even in a new venture situation, loss of profits can be recovered under appropriate circumstances. As noted by Judge Motley (145a), Essex agrees with that general proposition. But we vigorously contest that the appropriate circumstances have been proved here.

V. Amax's Actual T-ingot Profits Exceeded the Estimated "Lost Profits"

Essex's final point on damages is that Amax is obligated both under New York common law and under Section 2-708(2) of the Uniform Commercial Code to give Essex "due credit" for its resale of the metal in question

as T-ingot, and that this real profit must be proved and not guessed at (Essex Brief, pp. 28-31).

Amax concedes this to be the law (Amax Brief, p. 32) but again endeavors to draw the curtain as of the date of breach, and complains that it is difficult to identify which pounds of T-ingot would have gone to Essex and Okonite, and also that Essex's proof in this regard is inaccurate (Amax Brief, pp. 43-44).

Essex respectfully suggests that, difficult or not, Amax is obligated as a matter of law to give Essex "due credit" for the actual T-ingot profits it reaped. Whatever the law is on post-breach variations in costs (see pp. 7-11, *supra*), the language of Section 2-708(2) expressly states that the seller must give "due credit for payments or proceeds of resale". The provision does not even come into play unless an actual post-breach resale occurred, which Amax concedes here (185a), and thus post-breach facts must be examined in order to determine the magnitude of the "proceeds of resale."

Moreover, the task is not nearly as difficult as Amax suggests. Amax's selling price for T-ingot can be taken right off of invoices and it would be a simple matter to calculate an average selling price on a weekly, monthly, or annual basis. As to T-ingot cost, this figure is the product of the sophisticated cost system so carefully described by Briggs, and those T-ingot costs are now in evidence from certified auditors' reports on an annual basis for the years 1969 through 1972 (497a-498a). Amax's T-ingot profit is the difference between its actual prices and its actual costs.

This is *not* a case where Amax has averaged prices and costs on an annual basis, and Essex is contending that it should have been done on a monthly or weekly basis. Likewise this is *not* a case where Essex is contending that Amax has not appropriately matched the price of particular pounds of T-ingot with the cost of those same pounds. Amax has simply drawn the curtain as of the date of breach and refused to make any effort to prove its actual T-ingot profits.

Essex, on the other hand, proved Amax's actual T-ingot profits with the best evidence available to it. As to cost, Essex used Amax's own audited figures on an annual

basis. As to price, Essex used the actual T-ingot selling prices reflected on the New York Commodities Market which Amax's principal witness described as being "the book prices quoted by the consensus of the major aluminum suppliers" for "99.5 purety T-ingot delivered to the customer's location." (501a). *That proof conclusively demonstrates that Amax has in fact not been damaged at all* because it admittedly sold all the metal in question as T-ingot, prices for T-ingot increased sharply following the alleged breach by Essex, Amax's cost of T-ingot was considerably more stable, and thus the resulting T-ingot profits more than offset the lost profits attributed to the Supply Contract and the Okonite Contract (Essex Brief, pp. 28-31).

In contrast, Amax's only proof of the selling price for T-ingot is Clough's testimony that the appropriate price in May 1968 was 22.1 cents (501a). Not a single invoice has been presented as to the month of May or any other time. Similarly, the T-ingot cost utilized by Amax in its calculation is the figure of 16.2 cents, the *only* basis for which is the illegible scribble on Exhibit D-30 which Briggs testified he couldn't read, and further conceded that the only basis he had for testifying that this scribble is the cost of T-ingot is that the number appears on that piece of paper (278a-279a).

Essex's proof of Amax's profits on T-ingot sales may not be exact, but, at the very minimum, it compares rather favorably with the "evidence" of T-ingot profits offered by Amax. On this record, therefore, Amax is entitled only to nominal damages.

In a footnote (Amax Brief, p. 50), Amax argues that in calculating T-ingot profits, it took into account the missing "premium" billed to it by Intalco (notwithstanding the statement in the text of Amax's Brief that the "record is completely silent" as to the existence of any such premium, see pp. 4-7, *supra*). This was accomplished, according to the footnote, because in Clough's blackboard calculation of damages (156E) T-ingot costs were determined by subtracting this "premium" from the total estimated cost of making Properzi rod to arrive at T-ingot cost. It is understandable why this argument is relegated to a footnote!

Briggs testified that T-ingot was the simplest product that Intalco made (238a), that the cost of this "simplest product, our base product" was calculated according to the elaborate costing system he had previously described (278a), Clough confirmed that "Intalco regularly computes its T-ingot cost figures" (497a), and that such T-ingot costs are reflected to three decimal points in audited financial statements prepared by Price Waterhouse & Company (498a), and Amax's counsel read those numbers into the record (498a). In light of the ready availability of T-ingot costs from such sources, it is a little hard to comprehend why Clough calculated the cost of T-ingot in his damage presentation by starting with the cost of making Properzi rod (an estimated number) and then subtracting this "premium" of rod over T-ingot (another estimate), as asserted by Amax in the last sentence of its footnote, instead of just looking at the Price Waterhouse reports or Intalco's cost records.

VI. Breach of Maintenance Obligation by Amax

Essex's Point II in its principal brief, characterized by Amax as "Essex's subsidiary contention, argued late in its brief" (Amax Brief, p. 2), is that Amax breached its maintenance obligations under paragraph 4 of the Lease Agreement and this breach by Amax entitled Essex under paragraph 7 of the Lease Agreement "to enter the Ferndale plant and take possession of the Properzi and remove it . . ." (160E) (Essex Brief, pp. 31-48).

Amax first argues that Judge Motley had no occasion to determine whether Amax had properly discharged its responsibilities for maintenance and therefore did not find, as urged by Essex, that "Amax refused to assume the responsibility for maintenance" (Amax Brief, p. 23). Essex believes that the indicated portion of Judge Motley's opinion (139a) contains the finding urged by Essex, but in any event agrees with Amax that such an express finding was not necessary to Judge Motley's decision because she found that Amax's responsibility for maintenance never com-

menced. Therefore, she had no need to reach the question as to whether Amax performed its obligations.

Essex's point in this regard, however, is that Judge Motley's conclusion that Amax's responsibility for maintenance never commenced is wrong as a matter of contract law, and, contrary to the assertion by Amax (Amax Brief, pp. 24-25), the interpretation of a written contract is not a finding which is protected by the "clearly erroneous rule" of F.R.C.P. 52(a). *Emor, Inc.* v. *Cyprus Mines Corporation*, 467 F.2d 770 (3d Cir. 1972). The construction of a written instrument is a question of law, *Rochwood & Co.* v. *Adams*, 486 F.2d 110 (10th Cir. 1973), and as Judge Learned Hand stated ". . . appellate courts have untrammelled power to interpret written documents." *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947), *cert. denied*, 33 U.S. 845 (1948). Thus, this Court is in as good a position as Judge Motley to interpret the contract and the letter agreement under New York law.

If the contract interpretation urged by Essex is wrong, then that ends the matter. However, if this Court agrees that the contractual interpretation by Essex is correct, then Essex was entitled to remove the Properzi and also is entitled to the damages claimed by it *if* Judge Motley did find, as urged by Essex, that Amax failed to assume its responsibility for maintenance, *or if* in any event that is clear from the record, which it is (Essex Brief, pp. 39-41). At the very minimum, Essex is entitled to a new trial on the question of Amax's breach if this Court agrees with Essex's interpretation of the contract.

The evidence supporting Essex's interpretation of the contract is fully treated in Essex's principal brief (pp. 32-38) and will not be belabored again here.

As to expert testimony concerning the meaning of the technical term "running in," the only testimony offered was that of the Essex witnesses Dunstan and Kilburn (Essex Brief, pp. 35-37). The dictionary definitions offered by Amax support Essex or at the very worst are neutral (Essex Brief, p. 37).

As to the letter agreement between the parties on the meaning of "running in," the Essex letter of January 22,

1968 (13E) and the Amax response of February 8, 1968 (17E) make it clear beyond peradventure of a doubt that both sides agreed in writing there would be a gap between the "run in period" and "operating normal" (Essex Brief, p. 38; Amax Brief, p. 27). Amax's suggestion (Amax Brief, pp. 27-28) that Dunstan was purporting to agree on the meaning of "running in" when he answered "Yes" to the question quoted is incredible on its face. The questioner was simply paraphrasing Dunstan's definition of "operating normally" contained in his January 22, 1968 letter, and Dunstan agreed that indeed this was the meaning of operating normally. Obviously, when the Properzi was operating normally, "the original running in period would be regarded as at an end," as would all other earlier steps such as installation and training of the crew. In short, it takes a rather tortured reading of the testimony to assert that Dunstan's simple "Yes" constitutes an agreement, not on the meaning of "operating normally," but on the meaning of "running in."

Amax argues that Essex evidenced its agreement that day-to-day maintenance was Essex's responsibility by paying bills for maintenance charges submitted by Amax (Amax Brief, p. 28). Amax is correct that initially Essex paid bills covering rod shipments made through mid-March, 1968 (147E, 148E, 150E, 151E) because, as Dunstan had pointed out in his letter of January 22, 1968,

> ". . . the language in the contract leaves in doubt the responsibility for the maintenance costs during the 'running in period.' In order to expedite agreement, we will split the questionable cost and pay $5,026.00." (14E)

Dunstan similarly offered to compromise general cast house maintenance costs (15E).

Amax, on the other hand, wasn't interested in an accommodation (17E) but viewed paragraph 4 of the Lease Agreement as unambiguous:

> "On the question of contract language our lawyer who wrote the contract feels there is no doubt that the

responsibility for the maintenance costs is Essex'." (254E)

By May, Essex had grown tired of Amax's refusal to reach an accommodation on what appeared to be, at the most, a close question of contract law (346a-348a). Thus, Essex consulted its own inside counsel as to its legal rights under the contract and he concluded that Essex had the right to remove the equipment (399a-400a, 409a).

The question before this Court is whether the contract language, which seemed so free of doubt to Amax's lawyer (254E), is indeed free of doubt but in accord with the interpretation urged by Essex because of the express written agreement of the parties (13E, 17E).

Finally, Amax argues that as a matter of common sense, Essex should have responsibility for maintenance up to the point that the Properzi was "operating normally" (Amax Brief, pp. 28-29). As to this point, Essex rests on its previous discussion of the practicalities of the situation (Essex Brief, pp. 34-35).

In conclusion, Essex contends that the proper interpretation of the contractual language is that the "running in" phase was completed at some point in time *before* the Properzi was "operating normally" as the parties agreed in writing (13E, 17E). Although the parties agree that the Properzi was never "operating normally," Essex contends that the "running in" phase had been completed and therefore Amax's obligation to provide day-to-day maintenance had commenced. (Essex Brief, pp. 38-39)

If that interpretation is correct, then Essex was entitled to remove the Properzi under paragraph 7(d) of the Lease Agreement and is also entitled to damages from Amax because Judge Motley found, and in any event the record is clear, that Amax *never* assumed its obligations, *inter alia*, to pay for the maintenance costs. At the very least, the case should be remanded to Judge Motley for findings as to whether Essex had substantially performed its duties prior to Amax's breach and therefore could not only remove the Properzi but also recover damages. *Friedman* v. *Golden Arrow Films, Inc.*, 442 F.2d 1099, 1106 (2d Cir. 1971).

Before closing on this point, we note that Amax prefaces its treatment of Essex's "subsidiary point", and repeats it periodically throughout the brief, with the suggestion that this justification for Essex's removal of the Properzi is apparently an afterthought concocted by counsel for use at trial rather than a position believed in and relied upon by Essex in May, 1968 (Amax Brief, pp. 23, 2-3, 18, 29, 30). Amax made the same argument below and we ignored it as irrelevant. However, Judge Motley noted the point (138a), so we are hesitant to ignore it again.

It is quite true that Essex's termination letter of May 10, 1968 cited paragraph 3 of the Lease Agreement which gives Essex the right to promptly fix or remove the Properzi "should the Properzi fail to live up to specifications . . ." (159E). No mention was made in that letter of paragraph 7(d) which authorizes Essex to remove the Properzi "in the event of any breach by Amax of any of its agreements . . ."

Nonetheless, it is clear that Essex was repeatedly on record prior to May 1968 with its contention that Amax was not fulfilling its maintenance obligations. As early as December, 1967, Kilburn complained to Intalco that the required maintenance back-up was not being supplied (445a). In response to this complaint, Intalco reviewed its maintenance performance to date, and prepared a detailed report which in essence confirmed that Kilburn's complaints were legitimate (231E-234E, 249a). This report, and Kilburn's charges on inadequate maintenance, were discussed at a meeting at Intalco on January 9, 1968 attended by the executives of Amax, Essex, and Intalco (341a, 445a, 511a-513a, 13E). On January 22, 1968, Essex again questioned Amax's performance of its maintenance obligations under the Lease Agreement (14E), and raised the subject once more on March 5, 1968 (19E). On March 8, 1968, Kilburn further complained to the Intalco representatives about maintenance (223E). In April, Essex's Corporate Director of Costs traveled to Intalco to review the overall financial situation and he too came to the conclusion that Intalco was not properly taking responsibility for maintenance costs (170E-172E).

In short, the record shows very clearly that Amax was well aware, in May, 1968 and before, that Essex did not believe that Amax was fulfilling its maintenance obligations. Under these circumstances, counsel drafting the termination letter (399a-400a) had no reason to exhaustively tabulate every reason Essex had for terminating the contracts. The fact that Essex did not say, in the termination letter when citing paragraph 3 of the Lease Agreement, that the Properzi had failed "to live up to its specifications" because Amax had failed to provide the maintenance required by paragraph 4 is no more significant that Essex's failure to specify that the Properzi failed "to live up to its specifications" because of mechanical problems with the spouts, molds on the casting wheel, secondary cooling feature, and the emulsion—all of which were likewise well recognized by Amax (186E-187E).

VII. Miscellaneous Contentions by Amax

The Amax brief makes a variety of additional contentions which, although not rising to the stature of dispositive arguments, should nonetheless not be left unanswered.

Amax repeatedly argues that Essex was over-committed on aluminum purchases in 1968, that its contract with Alcoa was a better deal than its contract with Amax, and that this is the reason Essex "reneged" on its obligations to Amax (Amax Brief, pp. 3, 16-17). Judge Motley found that assertion persuasive (137a-138a).

Both Amax and Judge Motley confuse aluminum needed for rod, aluminum needed for billot, and aluminum needed for other purposes. It is quite true that in December 1967, at a very early stage in the Intalco operation, Essex entered into a second supply contract with Alcoa pursuant to which Essex undertook to purchase specified quantities of *molten aluminum* over a 15-year period (104E). However, in negotiating that Alcoa contract in the fall of 1967, Essex clearly assumed that it would also purchase from Amax those quantities of *aluminum rod* specified in the Supply Contract (355a, 401a). At this point in time, Essex was

engaged in an active program of acquiring aluminum fabricators and extruders, and therefore had to significantly increase its aluminum purchases (356a-357a, 411a-412a). Although in January, 1968, Essex did have a temporary over-supply of aluminum *in all forms* contracted for (but a need for 22 million pounds *of rod* versus a commitment to Amax for 18 to 25 million pounds (137E), management was looking ahead toward a threatened aluminum workers' strike and was also planning an additional June acquisition of another extruder (411a-412a). By July, the strike was a reality (275E), Essex had consummated its acquisition of a new extruder plant located in Coldwater, Michigan (412a), and Essex was short of aluminum even without considering the needs of the new Coldwater plant (275E). By October, Essex projected 57 million pounds of aluminum available from Alcoa for 1969, a need for 24 million pounds *in rod form* and a need for 43 million pounds *in billot or ingot form*, leaving Essex short at least 10.2 million pounds (139E). By December, 1968, this shortage had expanded to approximately 25 million pounds (267E). Thus, Essex's alleged motive for terminating the Supply Contract with Amax does not withstand analysis.

Amax also argues that on May 2, 1968, Nichols offered Essex a "risk-free proposal" wherein it guaranteed to get the Intalco Properzi "operating normally" within four weeks—a proposal Essex rejected out-of-hand (Amax Brief, p. 17). Amax fails to note that this same "risk-free proposal" was similarly offered to Amax on May 16, 1968 who likewise rejected it (163a, 201a-202a)—probably for the same reasons as Essex: the Nichols offer defined "while operating" in such a way as to eliminate all downtime caused by mechanical failures, the proposal was premised upon an adequate supply of mechanical and electrical maintenance and both supervisory and hourly personnel which was precisely the type of support Essex had never been able to obtain, the production rate guaranteed by this proposal was not even sufficient to enable Amax to meet its obligations to Essex under the Supply Contract let alone supply others, and so forth (86a-88a). Under the circumstances, this "risk-free proposal" amounted to

a concession by Nichols that they too could not operate the machine up to specifications which to Essex was the "crowning blow" (344a-345a).

Amax argues that after removing the Intalco Properzi, Essex did not ask that the manufacturer take it back (Amax Brief, p. 19). The record is to the contrary (353a).

Amax argues that Essex re-installed the Intalco Properzi at its own plant in Boonville, Indiana, and soon had the equipment operating satisfactorily after making "some minor design modifications with Nichols' help" (Amax Brief, p. 20). The "minor" nature of those design modifications was one of the most hotly contested issues at the trial, and although Judge Motley noted Amax's *assertion* that the modifications achieved at Boonville were not significant and could have been affected at Intalco (137a) and concludes that "the preponderance of the credible evidence established that Essex failed to make good faith effort to bring the Properzi machine up to specifications while located at Intalco . . .", the question was at least a close one. Essex disputes that the design modifications which were made at Boonville were in any way minor (90a-93a).

As to the Okonite Contract, Amax states that "Okonite had agreed to buy at least 120 million pounds during 1968-1972 (225E)" (Amax Brief, p. 21). Curiously, Judge Motley made the same mistake (133a). In fact, the Okonite Contract did not obligate Okonite to purchase any tonnage from Amax, but rather covered Okonite's "requirements" for aluminum rod over the period 1968 through 1972 which were "estimated" at 120 million pounds (225E). There is no evidence in the record as to what Okonite's "requirements" were, if any, during that period.

Amax argues that Essex's removal of the Properzi "put it beyond Amax's power to make the Properzi rod it contracted to sell to its customers Okonite and Essex" (Amax Brief, p. 31). Amax ignores the fact that in June, 1968, Essex offered to sell the Properzi to Amax in place and installed for $1.4 million. Although Amax offered $850,000, no agreement was reached (167a-168a, 348a-349a). Thus, for an investment of $1.4 million, Amax could have

immediately put itself in a position to make the "sure profit" (Amax Brief, p. 34) of $9,624,000 on the Okonite Contract alone (156E)—and would have had the Properzi equipment as well. Amax's decision not to make that investment leads one to ponder about those "sure" profits set forth in the blackboard calculation.

Of course, since the contract price of rod was specified at a fixed amount over the published book price of ingot (Amax Brief, p. 35), these profits were "sure" only if Amax could convert ingot into rod for an amount equal to or less than this "fixed premium." Otherwise, Amax would be better off selling the metal as T-ingot which, as Essex demonstrated above, proved to be the case.

Conclusion

Because of Amax's failure of proof, at most it can recover nominal damages as "lost profits." Assuming a breach by Essex, which is vigorously disputed, Amax is only entitled to judgment for $424,898.95 covering the billings for rod actually produced at Intalco and compromised by the parties on July 25, 1968. (148a)

However, because Amax breached its maintenance obligations under the Lease Agreement, Essex was entitled to exercise its contractual right to remove the Properzi, and in addition is entitled to damages of $343,659.96. Thus, judgment should be entered in favor of Amax for $81,238.99 plus interest according to law.

Dated: New York, New York
May 2, 1975

Respectfully submitted,

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Of Counsel

Service of 5 copies of the
within Brief is hereby
admitted this 2nd day of
May 19__

Signed _____

Attorney for Plaintiff-Appellee

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